FLOYD HIGGINS ET AL.

IBLA 96-520 Decided February 26, 1999

Appeal from a decision of the Oregon State Office, Bureau of Land Management, declaring unpatented mining claims forfeited by operation of law. ORMC 66640 through ORMC 66648.

Reversed.

1. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim--Mining Claims: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold

   Under 43 C.F.R. § 1821.2-2(e), an affidavit of assessment work due to be filed on or before Dec. 30, 1995, when the Federal Government, including BLM, was closed due to the Government furlough, would have been deemed timely filed if it had been received in the proper office on the next day the office was open to the public, i.e., on Jan. 8, 1996.

2. Estoppel--Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim--Mining Claims: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold

   The Board will apply the doctrine of estoppel in reversing a decision of BLM declaring mining claims abandoned and void for failure to file an affidavit of assessment work on or before Dec. 30, 1995, where BLM offers a crucial misstatement orally, which is confirmed in subsequent BLM memoranda to the file and in an official decision.

APPEARANCES: Roger F. Dierking, Esq., Portland, Oregon, for appellants; Marianne King, Esq., Office of the Regional Solicitor, Portland, Oregon, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE BYRNES

Floyd Higgins, Agatha Higgins, Agnes Halstead, Dale Higgins, Scott and Susan Lawrence, Steven Higgins, and Ellen and Waldo Johnson have appealed from an August 7, 1996, decision of the Oregon State Office, Bureau of Land Management (BLM), declaring the Gold 3 through Gold 11 unpatented mining claims (ORMC 66640 through ORMC 66648) forfeited by operation of law for failure to file an affidavit of annual assessment work performed for the 1995 filing period. In its decision, BLM explained the circumstances surrounding December 30, 1995, when appellants' affidavit of assessment work was due, and at which time BLM's offices were closed during the Government furlough:

> The Bureau of Land Management was officially closed for business from Saturday, December 13, 1995 through Sunday, January 7, 1996. January 8, 1996 was the first legal business day the Bureau of Land Management was open since December 12, 1995. Therefore, proofs of labor (and anything else due during the time the government was closed) are considered properly and timely filed if received and date stamped in this office on January 8, 1996 or were postmarked on or before December 30, 1995 and filed in this office consistent with 43 CFR 1821. The terms of 43 CFR 1821.2-2 apply to all documents, filings, fees etc. due while the government was on furlough.

BLM further described the circumstances surrounding Higgins' failure to timely file the affidavit of assessment work for the Gold 3 through Gold 11 mining claims:

> In this case, our records show that on December 27, 1995 Floyd Higgins personally attempted to file the required proof of labor document at this office as evidenced by his leaving both his card and hand written note indicating his desire to file the documents and pay the applicable fee. Because of the ongoing government furlough in effect at the time, no one was available to accept the document or process the transaction, and no copy of the proof of labor was left at this office. On the first day the office was open after the furlough, January 8, 1996, Mr. Higgins left three voice mail recordings asking that we contact him. However, to our chagrin, our voice mail message indicated that the office was still closed due to the furlough. On January 9, 1996, Mr. Higgins finally spoke with our Public Contact Representative who inadvertently told him it would be OK to file the proof of labor the following day. Accordingly, Mr. Higgins filed the 1995 proof of labor on January 10, 1996. Unfortunately, the documents were recorded too late and do not meet the filing requirements of the law within the specified time period and therefore, the claims must be considered forfeited.

The case file contains a memorandum dated August 9, 1996, written by Dean Delovan, Acting Section Chief, Realty Services Section, Oregon

State Office, memorializing a conversation between Glencora Lannen, identified in the memorandum as "Section Chief," Marianne Werner King, identified in the memorandum as "Regional Solicitor Attorney," Higgins, and himself regarding BLM's August 7, 1996, decision. According to Delovan, "Mr. Higgins was very unhappy with our position and felt that it was up to us to rectify the situation and reinstate his claims." Delovan stated that "[w]e informed him that although we were in agreement with him that he made every reasonable attempt to file the proof of labor document, (except to mail it in and get it postmarked as of December 30) we did not have the legal authority to change the requirement of the law."

In addition, the case file contains a memorandum by Sharon Mowery, dated January 10, 1996, in which she describes Higgins' efforts to make his annual filing, including the three voice mail recordings he left on January 8, 1996, the first day the office was open following the furlough. The case file contains an additional memorandum by Pat Pickens dated January 17, 1996, regarding Higgins' attempt to file his proof of labor. This memorandum states as follows:

> Mr. Higgins came into the Land Office on December 27th and left his business card under the door with his phone number and an urgent message. That card was given to Butch LaDue.
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> The three phone messages left by Mr. Higgins per Sharon's memo of Jan. 10th, 1996, were all left on the Land recorder, Monday, Jan. 8th, 1996, the first day the office was open after a 3 week furlough. Because of the high volume of calls, the phone lines were busy each time he called and the calls rolled into voice mail. That voice mail message was made by me sometime ago and was used on weekends and after hours. The phone system was changed and the same message rolled over to voice mail when the phone lines are busy. None of us were aware that it was doing that and the voice mail message was never changed.
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> That message was: "You have reached the Bureau of Land Management and we are closed at this time. Office hours are 8:30 to 4:00. Please call back during business hours." The message that callers received on Jan. 8th and 9th, if the phones were busy, was the same message that they would have received all through the furlough, which might lead people to think that we were still not back to work.
>
> I was out of the office on business two weeks prior to the furlough and the first day back after the furlough, I started my new job. Therefore, I was not in the Land Office and I was not advised of the phone calls from Mr. Higgins.
>
> When Mr. Higgins finally got through on Tuesday, Jan. 9th, he was informed that it would be ok to come in the next day to file, which he did.

In his statement of reasons (SOR) for appeal, Higgins related that on December 27, 1995, he went to BLM's public room office with an official copy of the affidavit of assessment work, but that it was locked. He states that he "did not see any notice posted on the door explaining that the office was closed with instructions for filing documents and paying fees." (SOR at 2-3.) He states further that

> [b]ecause documents and money placed under the door would be exposed to loss, in desperation [he] went to what he believes was a private business office on another floor in the building and requested persons to witness the placement of his card and note under the BLM public records office door.

(SOR at 3.) He points out what BLM admits in its decision and in the memoranda referred to above--that "[o]n January 8, 1996, the prerecorded message was not changed to notify the public that the office had been reopened," and that "[w]hen [he] called three times and left messages on January 8th, the recording notified him that the office was closed rather than informing him that the office was reopened on that date." Further, he states that when he "finally reached a public contact assistant on January 9, 1996 to learn when documents could be filed, he was inadvertently informed that under the office reopening procedures it would be acceptable to file the document and pay fees on January 10, 1996." (SOR at 3.) The above-referenced memoranda in the file confirm the veracity of Higgins' statements. Higgins argues that "[a]t a minimum Interior Department regulations and practices for providing notice to the public of official BLM office closures must not create uncertainty and confusion that prevents public compliance with statutory deadline filing dates when offices are closed and reopened." (SOR at 8.)

Finally, relying upon Justice O'Connor's concurring opinion in United States v. Locke, 471 U.S. 84 (1985), Higgins contends that BLM's decision should be reversed based upon equitable estoppel. In his opinion, "the failure to provide minimal adequate notice to address the inherent confusion attendant to indefinite office closures combined with the erroneous information given to Higgins and inadvertent actions taken by BLM employees, gave Higgins every reason to rely on the information and actions taken by BLM." (SOR at 9.)

[1] On July 5, 1995, pursuant to section 10101(d)(1) of the Omnibus Budget Reconciliation Act of 1993, 30 U.S.C. § 28f(d)(1) (1994), Higgins filed with BLM a small miner waiver certification for the assessment year running from September 1, 1995, through September 1, 1996. However, BLM declared his claims forfeited by operation of law because even though a certificate of exemption had been filed, he did not file a copy of the affidavit of assessment work with BLM by December 30, 1995, as required by section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(a) and (c) (1994), and implementing regulations, 43 C.F.R. § 3833.2. Under 43 C.F.R. § 1821.2-2(e), Higgins' affidavit of assessment work would have been deemed timely filed if it had been received in the

proper BLM office the first day the office was open to the public after the end of the Government shutdown, i.e., on January 8, 1996. Higgins' efforts to file this affidavit with BLM are at the heart of this appeal.

[2] For the reasons set forth below, we agree with Higgins that his case presents facts appropriate for application of estoppel. The Board has stated on a number of occasions that it will look to the elements of estoppel set forth in United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970), as the initial test in determining estoppel questions presented to the Board. Carl Dresselhaus, 128 IBLA 26 (1993); Leitmotif Mining Co., 124 IBLA 344 (1992); United States v. White, 118 IBLA 266, 98 I.D. 129 (1991). In Ptarmigan Co., 91 IBLA 113, 117 (1986), aff'd, Bolt v. United States, 944 F.2d 603 (9th Cir. 1991), we stated:

> First, we have adopted the elements of estoppel described by the Ninth Circuit Court of Appeals in United States v. Georgia- Pacific Co., 421 F.2d 92 (9th Cir. 1970):
>
> > Four elements must be present to establish the defense of estoppel: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the facts; and (4) he must rely on the former's conduct to his injury.

Id. at 96 (quoting Hampton v. Paramount Pictures Corp., 279 F.2d 100, 104 (9th Cir. 1960)). See State of Alaska, 46 IBLA 12, 21 (1980); Henry E. Reeves, 31 IBLA 242, 267 (1977). Second, we have adopted the rule of numerous courts that estoppel is an extraordinary remedy, especially as it relates to the public lands. Harold E. Woods, 61 IBLA 359, 361 (1982); State of Alaska, supra. Third, estoppel against the Government in matters concerning the public lands must be based on affirmative misconduct, such as misrepresentation or concealment of material facts. United States v. Ruby Co., 588 F.2d 697, 703 (9th Cir. 1978); D.F. Colson, 63 IBLA 121 (1982); Arpee Jones, 61 IBLA 149 (1982). Finally, we have noted that while estoppel may lie where reliance on Governmental statements deprived an individual of a right which he could have acquired, estoppel does not lie where the effect of such action would be to grant an individual a right not authorized by law. See Edward L. Ellis, 42 IBLA 66 (1979).

The Board applied these principles to hold that estoppel would lie against BLM in Leitmotif Mining Co., supra, and Carl Dresselhaus, supra, cases similar in material respects to the case before us. Leitmotif Mining Co., supra, involved a decision by the Nevada State Office, BLM, rejecting for recordation notices of location for mining claims because they were not filed in the proper BLM office as required by section 314(b) of FLPMA and 43 C.F.R. § 3833.1-2(a). Leitmotif located the claims on December 3, 1990, and on January 24, 1991, assertedly in accordance with oral instructions from BLM, filed the notices of location with the Nevada State Office.

In a letter to Leitmotif dated January 28, 1991, the Nevada State Office explained that it was returning the certificates without taking any action on them because they had been accompanied by a post-dated check to cover the recordation fees, and that Leitmotif still had "until March 4 to resubmit [its] certificates along with a properly dated check in order for them to be timely filed." On February 4, 1991, Leitmotif again filed the certificates with the Nevada State Office. Over 9 months later, the Nevada State Office rejected those filings because they were not made in the proper BLM office. BLM explained that the certificates should have been filed in the Arizona State Office in Phoenix.

The Board ruled that the facts in Leitmotif Mining Co., presented a "classic situation for the application of the doctrine of estoppel." 124 IBLA at 346. The Board ruled that BLM knew the true facts, i.e., the proper office for recordation of the claims, but that in its January 28, 1991, letter, BLM failed to inform Leitmotif that the Nevada State Office was not the proper BLM office for filing. The Board noted that the Nevada State Office did not at that time instruct the company that the Nevada State Office was the wrong one. It did not do so until over 9 months later, when it issued the decision rejecting the notices of location for recordation. The Board found that Leitmotif was ignorant of the true facts, since the regulations governing recording of mining claims with BLM were ambiguous as to where recordation filings were to be made. The Board also ruled that BLM's January 28, 1991, letter constituted an "official decision" within the meaning of Martin Faley, 116 IBLA 398, 402 (1990), and cases cited therein.

Similarly, the Board ruled that the facts in Carl Dresselhaus, supra, satisfied the elements set forth in Georgia-Pacific. In Dresselhaus, the California State Office, BLM, declared a series of mining claims abandoned and void for failure to file a notice of intention to hold the claims during the 1979 filing period. The claims were located within the boundaries of the Death Valley National Monument several decades prior to closure of the monument to mining by the Mining in the Parks Act of 1976 (MPA), Pub. L. No. 94-429, codified at 16 U.S.C. §§ 1902-1912 (1994). The National Park Service (NPS) published a series of proposed and final rules to implement the MPA, and BLM published a series of rules to implement FLPMA. The respective rules of NPS and BLM were inconsistent regarding filing requirements for mining claims in the National Park System. Having timely recorded their claims with the Superintendent of the Death Valley National Monument pursuant to section 8 of the MPA, appellants in Dresselhaus inquired whether they were required to make additional filings to protect their mining claims. By letter dated September 24, 1979, the California State Office, BLM, responded:

> [P]lease be advised that if your claims were properly recorded with the Superintendent of Death Valley National Monument, it is not necessary for you to record again with BLM. All required documents relating to claims within units of the National Park

> System must be filed with the Superintendent in accordance with 36 CFR 9.5. It is the responsibility of the Park Service to provide copies to BLM.

Nearly 12 years later, on July 16, 1991, BLM issued its decision declaring the claims in the Death Valley National Monument abandoned and void because the appellants failed to file with BLM a notice of intention to hold for the 1979 filing period.

In finding that these facts met the criteria of Georgia-Pacific, the Board reasoned as follows:

> BLM knew the true facts, and it can be reasonably stated that appellants were ignorant of the true facts. The facts were, as noted, that BLM published an emergency rule on April 5, 1979, explicitly stating for the first time that the owner of an unpatented claim within the NPS was required to file before October 22, 1979, and on or before December of each calendar year after the year of recording a notice of intention to hold the mining claim, and that these documents should be filed with BLM. BLM's letter to appellants, however, did not reflect those facts. It erroneously informed appellants that all documents relating to claims within the NPS were required to be filed with the Superintendent, and it failed to disclose that a notice of intent was required for 1979. Moreover, at the time appellants made their inquiry of BLM they were vigorously defending these claims and others in the contest proceeding. Thus, it is reasonable for appellants to have assumed that there was no necessity to file a notice of intention to hold in 1979, as both NPS and BLM were well aware of their claims.

128 IBLA at 34.

In both Leitmotif and Dresselhaus this Board ruled that letters from BLM constituted an "official decision" under Faley. The letters in those cases contained misleading information or concealed material facts from the appellants. In both those cases, the Board stated that by concealing a material fact from the appellants, BLM induced them not to make the filings necessary to protect their mining claims. In Dresselhaus the Board stated that BLM's failure to provide correct information to the appellants "violates the standards of fundamental fairness." 128 IBLA at 35.

Based upon the Board's rulings in Leitmotif and Dresselhaus, we agree with Higgins that his case presents facts appropriate for application of estoppel. The record is beyond dispute that Higgins called BLM's office and left three voice mail messages on January 8, 1996--the first day the office was open after the furlough. In its decision, BLM admits that its recording notified Higgins that the office was closed rather than informing him that the office had reopened on that date: "However, to our chagrin, our voice mail message indicated that the office was still closed

due to the furlough." In her memorandum, which is in the file, Pat Pickens stated that the recording, which she had made, "might lead people to think that we were still not back to work." It is true that had Higgins' affidavit of assessment work been placed in an envelope postmarked on or before December 30, 1995, and received by BLM consistent with 43 C.F.R. § 1821, it would have been deemed timely filed. However, it is also true that had BLM's recording not informed Higgins that the office was closed on January 8, 1996, he would have had the opportunity to visit the office personally and file his affidavits.

The Board observed in Leitmotif and Dresselhaus that because estoppel against the Government in matters concerning the public lands is an extraordinary remedy, it must be based upon a demonstration of affirmative misconduct, such as misrepresentation or concealment of material facts. This Board has held that oral statements by BLM are insufficient to support a claim of estoppel. In Martin Faley, supra, the Board stated:

> We have expressly held that, as a precondition for invoking estoppel, "the erroneous advice upon which reliance is predicated must be 'in the form of a crucial misstatement in an official decision.'" Cyprus Western Coal Co., [103 IBLA 278 (1988)] at 284, quoting United States v. Morris, 19 IBLA 350, 377, 82 I.D. 146, 159 (1975), and cases cited therein.

116 IBLA at 402; see Marathon Oil Co., 16 IBLA 298, 316, 81 I.D. 447, 455 (1974), rev'd on other grounds, Marathon Oil Co. v. Kleppe, 556 F.2d 982 (10th Cir. 1977), quoting Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970).

In Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51 (1983), cited in United States v. Locke, supra, the Supreme Court declined to apply estoppel in the absence of a written document containing the erroneous information:

> The appropriateness of respondent's reliance is further undermined because the advice it received from Travelers was oral. It is not merely the possibility of fraud that undermines our confidence in the reliability of official action that is not confirmed or evidenced by a written instrument. Written advice, like a written judicial opinion, requires its author to reflect about the nature of the advice that is given to the citizen, and subject that advice to the possibility of review, criticism and reexamination.

467 U.S. at 65.

In Kenneth Lexa, 138 IBLA 224 (1997), the Board cited Heckler in rejecting a claim that BLM should be estopped from declaring his claims abandoned and void because he had failed to comply with the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1993, Pub. L. No. 102-381, 106 Stat. 1378-79 (1992). The appellant argued that

he failed to file a certification of exemption form based upon the advice of BLM employees. In the absence of an "official decision," the Board found that the appellant's arguments failed to "overcome the concerns expressed by the [Supreme] Court about the reliability of oral advice," observing that "a written document preserves the evidence of the mistaken advice in a way that diminishes speculation as to whether the employees really understood the question being asked." 138 IBLA at 230.

We find that concerns about the reliability of the information provided Higgins have been overcome. The erroneous information was given in a tape recording so that issues about its reliability are absent. BLM does not dispute the fact of the erroneous recording; in fact, BLM confirms its content in subsequent memoranda to the file as well as in its decision declaring the claims forfeited. "Affirmative misconduct" need not rise to the level of an effort on the part of Government employees to deliberately mislead an appellant. We did not impute to the BLM employees in Leitmotif and Dresselhaus a calculated effort to deprive the appellants of their mining claims. Suffice it to say that the communication of a crucial misstatement in those cases, as inadvertently mistaken as it might have been, operated to conceal from the appellants the true facts in those cases. The same holds true in Higgins' case. Given the diligence with which he made repeated efforts to file the affidavit of assessment work in this case, we think that it would violate the standards of fundamental fairness to affirm BLM's decision.

Finally, as in Leitmotif and Dresselhaus, this is not a situation where estoppel will result in Higgins being granted a right not authorized by law. Further, as in those cases, this is a case in which Higgins would otherwise have timely made the required filing, but for BLM's concealment, even if inadvertent, of the fact that the office had reopened. We find that estoppel is properly invoked to prevent BLM from declaring Higgins' claims forfeited and void for failure to timely file his affidavit of assessment work.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is reversed.

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James L. Byrnes
Chief Administrative Judge

I concur:

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Bruce R. Harris
Deputy Chief Administrative Judge